STATE OF MICHIGAN
IN THE SUPREME COURT

JOHANNA WOODARD and STEVEN WOODARD, Individually, and JOHANNA WOODARD as Next Friend of AUSTIN D. WOODARD a Minor,

Plaintiffs/Cross-Appellants,

-vs-

JOSEPH R. CUSTER, M.D.,

Defendant/Cross-Appellee,

and

JOHANNA WOODARD and STEVEN WOODARD, Individually, and JOHANNA WOODARD as Next Friend of AUSTIN D. WOODARD a Minor,

Plaintiffs/Cross-Appellants,

-vs-

UNIVERSITY OF MICHIGAN MEDICAL CENTER,

Defendant/Cross-Appellee.

Supreme Court Nos.: 124994
124995

Court of Appeals No.: 239868
Washtenaw County Circuit Court
Case No.: 99 5364 NH

**CASE CONSOLIDATED AND JOINED WITH:**
Court of Appeals: 239869

Court of Claims: 99-017432 CM

124994-5


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**DEFENDANTS/CROSS-APPELLEES' BRIEF IN RESPONSE TO PLAINTIFFS/CROSS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

**PROOF OF SERVICE**


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## STATEMENT OF APPELLATE JURISDICTION

Defendants/Cross-Appellants agree with the Statement of Appellate Jurisdiction set forth in Plaintiffs/Cross-Appellants' Application.

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## STATEMENT OF QUESTION INVOLVED

**I. DID THE TRIAL COURT PROPERLY GRANT DEFENDANTS' MOTION TO STRIKE DR. CASAMASSIMA AS AN EXPERT WITNESS, GIVEN DR. CASAMASSIMA'S OWN ADMISSION THAT HE LACKED ANY BACKGROUND, TRAINING OR CERTIFICATION IN PEDIATRIC INTENSIVE CARE MEDICINE, AND WAS THEREFORE NOT QUALIFIED TO OFFER STANDARD OF CARE TESTIMONY UNDER MCL 600.2169?**

| | |
|---|---|
| **Plaintiffs/Cross-Appellants say:** | **"No"** |
| **Defendants/Cross-Appellees say:** | **"Yes"** |
| **Trial Court said:** | **"Yes"** |
| **Court of Appeals said:** | **"Yes"** |

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## COUNTER-STATEMENT OF NEED FOR SUPREME COURT REVIEW

Defendants/Cross-Appellees disagree with Plaintiffs/Cross-Appellants' assertion that "[t]his case is particularly important since (sic) Court of Appeals did not follow the ruling in their own case of *Tate v. Detroit Receiving Hospital,* 249 Mich. App. 212 (2002)." Defendants/Cross-Appellees maintain that *Tate* does not stand for the proposition that a trial court abuses its discretion in determining that a manifestly unqualified pediatrician, who never set foot in a hospital during the time period relevant to this lawsuit, let alone into a pediatric intensive care unit, has no qualification to address the issues presented in this case.

Additionally, this Court recently heard oral argument in two consolidated cases, *Grossman v. Brown* (Docket # 122458) and *Halloran v. Bhan* (Docket # 121523), and will render its Opinion regarding the meaning of the term "specialist" as it is used in MCL 600.2169. It is respectfully submitted that whatever conclusion this Court should reach regarding subspecialty certification, this Court will conclude that Plaintiff's expert in the instant case is woefully, manifestly unqualified under the loosest conceivable criterion.

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## STATEMENT OF FACTS

### Introduction

These consolidated medical malpractice claims concern care and treatment rendered at Mott Children's Hospital between 1/30/97 and 2/28/97 to 15-day-old Austin Woodard, a critically ill child with retrosyncytial virus (RSV). RSV bronchiolitis is a life-threatening respiratory disease, which attacks infants, with varying degrees of severity, usually in the winter months. The RSV virus attacked Austin Woodard severely; he was dangerously hypoxic on the date of his admission. To save his life, Austin required pediatric intensive care treatment, including intubation, ventilatory support and placement of a feeding tube. He also required placement of an arterial line in his right femoral vein (in the lower extremity, for obtaining frequent samples of blood to monitor oxygenation status), and a left venous catheter (to assure a dependable route for administration of medications).

Contrary to what is stated in plaintiff's Cross-Application, the trial court ***did not*** hold that plaintiff's purported "expert", a practicing attorney who during the applicable time practiced general pediatrics (without a whit of training or experience in intensive care medicine), was unqualified to testify because he "did not match the exact subspecialties" held by the attending pediatric intensive care physician, Dr. Joseph Custer (the Director of Mott Children's Hospital's PICU). Rather, the trial court correctly determined that plaintiffs' proposed expert ***never*** had the slightest exposure to the world of pediatric intensive care, and therefore was unqualified to render opinions regarding the subject matter relevant to this case.

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Defendants filed an Application for Leave to Appeal that portion of the Court of Appeals ruling below which reinstated plaintiff's claim on the basis that it could be submitted to a jury with a res ipsa loquitur instruction. With respect to plaintiff's Cross-Application, defendants maintain that the appellate panel below rightly left undisturbed the trial courts decision regarding Dr. Casamassima's lack of qualification to address pediatric critical care medicine issues.

## Underlying Facts

Austin Woodard was born on January 15, 1997. He was brought to the University of Michigan Hospital on January 30, 1997 (age 15 days), via EMS, after being seen by his pediatrician, Dr. Kennedy, with respiratory distress (Austin's oxygen saturation at Dr. Kennedy's office was noted to be extremely poor, at 75%). (Exhibit A)[1] Austin was stabilized in the emergency department (where he was observed to be cyanotic, in significant respiratory distress[2]), and admitted to the PICU at Mott Children's Hospital. (Deposition of PICU attending, Dr. Joseph Custer, Exhibit B, p. 14) He remained hospitalized at Mott through February 28, 1997.

Within a few hours of admission, due to the patient's poor respiratory status, Dr. Custer intubated the patient. (Custer dep., p. 14-15) Austin was, in essence, one very sick

[1] To avoid unnecessary duplication of paper, the exhibits referenced in this brief are attached to the Application for Leave to Appeal filed by these defendants on November 12. 2003.

[2] Cyanosis is characterized by a bluish discoloration around the lips, due to inadequate oxygenation, and was noted in the record as one of the reasons why the patient was taken to see Dr. Kennedy on 1/30/98.

little child; he had a respiratory virus, which virulently impaired his ability to breathe and oxygenate. (Custer dep., p. 15-16; Austin was a baby "so sick [that] he required mechanical ventilation . . . . ")

Dr. Custer is Director of Pediatric Critical Care Medicine at Mott Children's Hospital. (Custer dep., p. 3-4) He has been director of Critical Care since 1985. (Custer dep., p. 4) Dr. Custer has three board certifications: he is certified in pediatrics, pediatric critical care medicine and neonatology-perinatology. (Custer dep., p. 4) He is director of the fellowship training program in pediatric critical care medicine, and supervises physicians who work in the division of critical care medicine. (Custer dep., p. 5)

Austin came under the care of another PICU attending, Dr. Norma Maxvolt, between January 30 and February 7, 1997. (Custer dep., pp. 16-17) On January 31, 1997, a right femoral line was inserted in the patient, without complication, and on February 2, 1997, a central venous catheter was placed in the left femoral vein, also without complication. (Defendant's Answer to Plaintiff's Complaint, Exhibit C, p. 6, ¶ 7)

Austin's condition gradually improved, though the first effort to wean him from the ventilator failed, and Austin required re-intubation. (Casamassima dep., Exhibit D, p. 22) When Dr. Custer resumed care of the patient, the objective was to remove Austin from mechanical ventilation. (Custer dep., p. 17) Dr. Custer saw the patient daily after February 7, 1997, and as of February 9, there was nothing out of the ordinary. (Custer dep., p. 17-20) Austin remained on the ventilator, and the plan was to extubate. (Custer dep., p. 21) Austin was weaned from ventilatory support. (Custer dep., p. 21) The femoral lines had been



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removed; the removal was charted on February 7, 1997, (it is a minor procedure, usually done by the nurses). (Custer dep., p. 22-24) Dr. Custer determined when the line was removed by reference to the ***critical care*** flow sheet, which showed that the CVC left groin line was removed at 2100 hours, "per doctor". (Custer dep., p 23-24) No peripheral lower extremity lines, according to the medical record, existed after February 7th. (Custer dep., p. 24)

To the delight of his caregivers, Austin progressed well. He came of the respirator on February 9, 1997, and was extubated. (Custer dep., p. 21)

Shortly after Austin was transferred from the PICU, he exhibited problems; his left leg became swollen and painful to touch. (Custer dep., p. 30) The suspected and later confirmed cause was deep vein thrombosis (DVT). (Custer dep., p. 31) Austin's left leg was x-rayed on February 11, and it revealed a fracture at the lower end of the femur. (Exhibit E) A second fracture on the right extremity was revealed on February 13, per a radiology report. (Exhibit F) Because the fracture was consistent with potential abuse, Dr. Randall Loder (pediatric orthopedic surgeon) and Dr. Clyde Owings (who investigates all potential claims of child abuse as head of the Child Protection Team) were consulted. (See, Exhibit G; see also, Exhibit H, Owings Dep., pp. 8-9)

**Anthony Casamassima, M.D. – Qualifications and Testimony**

The Complaints filed in the Washtenaw County Circuit Court and the Court of Claims were accompanied by Affidavits of Merit signed by a general pediatrician and personal injury lawyer, Anthony Casamassima, M.D., J.D. Dr. Casamassima was also plaintiffs' sole expert

witness (i.e., he was identified on plaintiffs' witness list as the only expert witness who would be offered at the time of trial to testify on standard of care issues). There were various motion proceedings related to Dr. Casamassima's qualifications, early in the litigation and again shortly prior to trial. Those proceedings are detailed below, following a discussion of Dr. Casamassima's testimony and professional background.

Beginning in March, 1998, Anthony Casamassima, J.D., began full time practice as a personal injury lawyer, prosecuting medical malpractice cases in the law firm of Edelman and Edelman, P.C. (Exhibit D, Casamassima dep., p. 56-57) He described Edelman and Edelman, P.C. as "a plaintiff's personal injury firm." (Casamassima dep., p. 56) He currently practices medicine "two days a week". (Casamassima dep., p. 58) Between 1995 and 1998, he did "independent contracting work.. as a lawyer" for Edelman and Edelman, P.C. (Casamassima dep., p. 58) This included management of plaintiff's medical malpractice cases. (Casamassima dep., p. 58) The "two days a week" medical practice involves running a home for mentally disabled patients in Westchester County. (Casamassima dep., p. 59)

Plaintiffs argued below that the trial court paid insufficient attention to Dr. Casamassima's activities during the period of Austin Woodard's admission to Mott Children's Hospital (January-February 1997); Dr. Casamassima became a full time lawyer in March of 1998. (Casamassima dep., p. 63) During 1997, Dr. Casamassima was "Director of Medical Affairs" at Richmond Children's Center, the home for mentally disabled children in Westchester. (Casamassima dep., p. 63) Dr. Casamassima concedes that his practice during



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this period was, with "some genetics thrown in", a basic "general pediatrics" practice. (Casamassima dep., p. 64) Dr. Casamassima lists 18 publications on his Curriculum Vitae; one is "Spoilation of Evidence in Medical Malpractice", an indication of his professional interest in "medical/legal" work. (Casamassima dep., p. 68) ***Dr. Casamassima has no training or experience in pediatric intensive care, pediatric hematology or pediatric infectious disease.*** (Casamassima dep., p. 69).

Dr. Casamassima has not placed a central venous or arterial line since his residency. (Casamassima dep., p. 99-100) He has not intubated a patient since the early 1980s. (Casamassima dep., p. 100) Nonetheless, Dr. Casamassima indicates that placement of arterial and venous lines, and the intubation, are possible mechanisms for Austin Woodard's hip fractures. (Casamassima dep., p. 10-11)

**Pre-Trial Proceedings**

On October 4, 1999, plaintiffs filed their Complaint against the Regents of the University of Michigan in the Court of Claims, appending an Affidavit of Merit by Dr. Casamassima. (Exhibit J) The allegations set forth in Dr. Casamassima's affidavit relate to purported failures on the part of the PICU staff to:

- "Properly treat and monitor the infant Plaintiff with the degree of care required so as not to fracture Plaintiff's bones during insertion of arterial lines and femoral venous lines";
- "Properly treat the infant Plaintiff with the degree of care required in the insertion of an arterial line so as not to subject Plaintiff to a loss of blood requiring transfusion";

- "Properly monitor the infant Plaintiff after placement of a femoral venous line and allowing him to lay on one side for over an hour subjecting Plaintiff to swelling and deep vein thrombosis . . ."; and
- "Properly monitor the infant Plaintiff after placement of a femoral venous line and arterial line, and after undergoing a blood transfusion, to prevent the onset of line sepsis, subsequent bacterial endocarditis and resultant septic emboli causing multiple cerebral infarctions".

(Exhibit J)

On October 7, 1999, plaintiffs filed the Washtenaw County Circuit Court Complaint naming Joseph R. Custer, M.D., Michael K. Lipscomb, M.D., Michele M. Nypaver, M.D. and Mona M. Riskalla, M.D. as defendants.[3] (Exhibit K) This Complaint, as well as the appended Affidavit of Merit by Dr. Casamassima, contained essentially the same allegations as those set forth in the Court of Claims case. The two cases were consolidated under the Court of Claims Act (MCL 600.6421) before Washtenaw Circuit Court Judge Timothy P. Connors.

On or about February 7, 2000, defendants filed a Motion for Summary Disposition, arguing that plaintiffs' Affidavit of Merit was filed late, and that Dr. Casamassima's affidavit did not meet the requirements of MCL 600.2912d, in that Dr. Casamassima had no training or experience in pediatric intensive care medicine, and therefore was not an expert who could be reasonably expected to satisfy the requirements of MCL 600.2169. (Exhibit L) A hearing on this motion was held on March 31, 2000. The court concluded that the affidavit had been filed impermissibly late, but that dismissal was not an appropriate remedy if Dr. Casamassima's affidavit otherwise met the requirements of MCL 600.2912d. (Exhibit M, T,

[3] All defendants in the Circuit Court action except Dr. Custer were dismissed by stipulation.



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3/31/00, p. 11-12) Judge Connors went on to hold that "the plain language of the statute indicates that specializations are to be taken into consideration but does not mention sub-specializations." (T, 3/3100, p. 12) He therefore concluded that, because the defendant physicians[4] and Dr. Casamassima "share[d] a board certified specialization in pediatrics", plaintiffs' counsel had reasonably believed that Dr. Casamassima met the requirements of MCL 600.2912d. (T, 3/31/00, p. 12)

At the request of defense counsel, Judge Connors clarified his ruling:

MR. BOOTHMAN: . . . I would ask the Court make it clear, this Court is not ruling that he [Dr. Casamassima] is qualified to testify at trial against these defendants.

THE COURT: All I'm ruling at this point is on the issue of the affidavit of merit. Obviously you'll be taking those issues up at a later time.(T, 3/31/00, p. 12-13)

***Thus, plaintiffs were on notice, from the first responsive pleading, that defendants would challenge Dr. Casamassima's qualification to testify as an expert witness at the time of trial.***

A voluminous amount of discovery was undertaken in the ensuing year and a half, including plaintiffs' depositions of Dr. Custer and a large number of physicians involved in Austin Woodard's care and treatment. The only independent (non-treating physician) expert listed on Plaintiffs' Witness List was Dr. Casamassima. (Exhibit N)

[4] Dr. Nypaver, Dr. Lipscomb and Dr. Riskalla had not yet been dismissed. Dr. Nypaver was a specialist in pediatric emergency medicine. Dr. Lipscomb and Dr. Riskalla were residents. (Exhibit N)

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After a consent order compelling the deposition of Dr. Casamassima was entered on July 20, 2001, the deposition of Dr. Casamassima went forward on August 10, 2001. (Exhibit D)

On or about August 30, 2001, defendants filed their Motion to Strike Dr. Casamassima as an Unqualified Expert. (Exhibit O)

At the hearing on this motion on September 14, 2001, defense counsel reminded Judge Connors of the earlier ruling on the Affidavit of Merit, noting that the court had specifically "reserved the issue of whether or not this expert would be qualified to testify at the time of trial." (Exhibit P, T, 9/14/01, p. 14) The time had come to decide that issue (trial was scheduled for December 17, 2001). Defense counsel argued that the legislature, while not pondering distinct and fine gradations of various specialties versus sub-specialties, clearly intended with MCL 600.2169 to "keep those who don't know what they are talking about from criticizing those in another field." (T, 9/14/01, p. 15) In this instance, ***during the time period at issue in this case,*** Dr. Casamassima did not set foot in any hospital, let alone a hospital containing a pediatric intensive care unit. (T, 9/14/01, p.15) Rather, he worked in a small facility for developmentally disabled youngsters. (T, 9/14/01, p. 15) He had no basis to offer testimony regarding the placement of central lines into the tiny vessels of a week old infant, or how intubation should have been done in this case, when he had not intubated an infant since his residency. (T, 9/14/01, p. 15-16)

Plaintiffs' counsel responded by indicating that this is essentially a res ipsa loquitur case, based upon circumstantial evidence, and that Dr. Custer had conceded that these types

of fractures do not occur during procedures (line placement and intubation). (T, 9/14/01, p. 18-19) Thus, counsel argued that these fractures do not occur in an infant this age in the first two weeks of an admission to the hospital, and Dr. Casamassima was "certainly qualified" to testify to that. (T, 9/14/01, p. 21)

The trial court held that MCL 600.2169 controls the determination of who may testify as an expert in this case. (T, 9/14/01, p. 29) The court found the following from Dr. Casamassima's testimony:

- Between December 1993 and March of 1998, none of Dr. Casamassima's clinical practice involved pediatric critical care medicine;
- Dr. Casamassima has no experience or training as an attending physician in a pediatric intensive care unit;
- He has no training in pediatric infectious disease or pediatric hematology;
- The last time he performed an intubation or placement of a central line was during his residency in the early 1980s;
- He became a full-time lawyer in March of 1998; and
- His pediatric practice contains approximately two days per week in the context of a home for mentally disabled children, in which he performs no work as an attending physician responsible for patient care. (T, 9/14/01, p. 30-31)

Considering this testimony, the court concluded that Dr. Casamassima "did not devote a majority of his time within the year preceding the injury to the same active clinical specialty as Dr. Custer or the staff of the pediatric intensive care unit." (T, 9/14/01, p. 31) Dr. Casamassima had "admitted" that he had "no experience" in pediatric critical care within one year prior to the injury complained of. (T, 9/14/01, p. 31) Thus he was not qualified to testify under MCL 600.2169. (T, 9/14/01, p. 31) Because plaintiffs had relied exclusively upon Dr. Casamassima to provide expert testimony, and now had no expert testimony with



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which to demonstrate violations of the standard of care on the part of Dr. Custer and the PICU staff, dismissal of all claims was appropriate. (T, 9/14/01, p. 31-32)

Plaintiffs subsequently filed motions for leave to amend (to allege res ipsa loquitur), for extension of time to name a new expert, and for a determination as to the necessity of expert testimony. Oral arguments on these motions were heard on October 12, 2001, and the trial court indicated its intent to rule on the motions in a written opinion and order. (T, 10/12/01, p. 25)

In its Opinion and Order dated February 7, 2002 (Exhibit R), the trial court made the following rulings of law:

- Permitting an amendment to the complaints to assert ordinary negligence and/or res ipsa loquitur would be futile, because whether or not Austin Woodard's fractures could have occurred in the absence of negligence is one which must be supported by expert testimony (Opinion, p. 4-5);
- Expert testimony would be required in order for plaintiffs to meet their burden of proof, as (because this case involves medical procedures, the understanding of which is outside the knowledge of a lay jury) whether these injuries could have occurred in the absence of someone's negligence requires expert testimony (Opinion, p. 5-6) and;
- Fairness did not require an extension of time to amend the plaintiffs' Witness List to name a new expert, where the case was over two years old, trial was scheduled two months hence, and plaintiffs' had been placed on notice some eighteen months prior to the filing of defendants motion to strike, that defendants would challenge Dr. Casamassima's qualifications to testify.

Accordingly, the court ordered that plaintiffs' various motions were denied, and that the case was dismissed, with prejudice. (Opinion and Order, 2/7/02)

## Decision of the Court of Appeals

The three-member panel of the Court of Appeals did not agree on any single disposition of the two primary issues presented on appeal: 1) whether Dr. Casamassima was qualified to testify under MCL 600.2169, and 2) whether this case could be permitted to go to the jury, absent expert testimony, on the basis that a jury did not require expert testimony and could, under the facts of this case, "infer" negligence. Judge Talbot and Judge Meter agreed that Dr. Casamassima is unqualified to testify in this case. (See, Opinions and Orders attached to Plaintiff's Cross-Application at Exhibit 2).

The three separate opinions, as they relate to the issues raised in Plaintiff's Cross-Application, are discussed below.

## Opinion of Judge Talbot

Judge Talbot began by noting that it was Plaintiff's claim that this case "is not grounded in pediatric critical care but in general pediatric medicine," such that Dr. Casamassima is qualified. (Talbot op., p. 4) The plaintiff had failed to establish the manner in which the fractures occurred (an issue more broadly discussed in the section of Judge Talbot's opinion discussing the res ipsa issue), and thus plaintiff had failed to establish that the issue presented was one of "general" rather than "intensive care" pediatric medicine. (Talbot op., p. 5) Judge Talbot observed "it is the *plaintiff's* burden of proof to show the standard of care in a medical malpractice case." (Talbot op., p. 5, fn 1, citing this Court's decision in *Locke v. Pachtman,* 446 Mich. 218, 222, 521 N.W.2d 785 (1994) (emphasis by Judge Talbot).

Referring again to sec. 2169(a)(1), Judge Talbot referenced that "Dr. Casamassima "acknowledged that he was unaware of the precise standard of care for the treatment of critically ill infants." (Talbot op., p. 5) He cited the record establishing that Dr. Custer was board certified in pediatrics, pediatric critical care medicine, and neonatology-perinatology. (Talbot op., p. 6) Because Plaintiff's claims "rested in the area of pediatric critical care medicine," it was clear that "plaintiffs' expert was required" to be certified in that specialty. (Talbot op., p. 6) If the trial court believed that Dr. Casamassima was required to have the identical certifications as Dr. Custer, any error was harmless: because Dr. Casamassima had no qualification in pediatric intensive care medicine, the trial court did not abuse its discursion in ruling that Dr. Casamassima's background did not qualify him in PICU medicine under sec. 2169. (Talbot op., p. 6)

Judge Meter concurred in Judge Talbot's analysis of this issue.

**Opinion of Judge Borrello**

Judge Borrello dissented from Judge Talbot' opinion. (Borrello op., p. 1) In his view, because there was no direct proof as to how the fractures occurred, the trial court abused its discretion in determining that expert testimony by an expert board certified in pediatric critical care medicine was required. (Borrello op., p. 3)

## ARGUMENT

## I.

## THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION TO STRIKE DR. CASAMASSIMA AS AN EXPERT WITNESS, GIVEN DR. CASAMASSIMA'S OWN ADMISSION THAT HE LACKED ANY BACKGROUND, TRAINING OR CERTIFICATION IN PEDIATRIC INTENSIVE CARE MEDICINE, AND WAS THEREFORE NOT QUALIFIED TO OFFER STANDARD OF CARE TESTIMONY UNDER MCL 600.2169

### Standard of Review

Defendants do not dispute plaintiffs' assertion that summary disposition determinations are generally reviewed *de novo.* A trial court's decision regarding whether an expert witness is qualified, however, and the actual admissibility of a proffered expert's testimony, are matters within the trial court's discretion. *Tate v Detroit Receiving Hospital,* 249 Mich. App 212, 215, 642 NW2d 346 (2002). Such decisions are reviewed on appeal for an abuse of discretion. Id.

### Discussion

It is impossible to review the trial court record without drawing the conclusion that permitting so manifestly an unqualified expert as Dr. Casamassima to testify in a case such as this, against a specialist with the credentials of Dr. Custer, was precisely what the Legislature sought to forbid with the enactment of MCL 600.2169. In *McDougall v Schanz,* 461 Mich. 15, 597 NW2d 148 (1999), this Court observed that the Legislature, in enacting section 2169, significantly stiffened the requirements regarding the qualifications of purported "experts" who would Monday morning quarterback the decisions of such highly trained specialists as

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Dr. Custer. It is respectfully submitted that doctor *cum* lawyer Dr. Casamassima is totally out of his depth in addressing the issues presented in this case. In fact, having observed that Dr. Casamassima, during the period between 1993 and 1998, never set foot in a hospital as an attending physician, let alone an attending critical care specialist, Judge Connors would have been fully justified in ruling that Dr. Casamassima's testimony regarding his professional activities would have provided insufficient foundation for admissibility of his testimony under the MRE 702 standard, let alone the heightened standard of MCL 600.2169.

Defendants submit that any interpretation of MCL 600.2169 which would permit an expert such as Dr. Casamassima to opine regarding issues of pediatric critical care medicine, in this context, would render the statute toothless, and utterly insufficient to accomplish, to any meaningful degree, the well known purposes for which it was enacted.

It is difficult to imagine an expert witness less qualified to testify in this case than Dr. Casamassima. So completely is his resume devoid of any background or experience in pediatric critical care medicine that plaintiffs' appellate counsel seemingly was compelled to resort to such bizarre mischaracterizations of the record as "plaintiffs' theory is that the fractures of Austin's legs occurred during ***general pediatric maneuvers***." (Plaintiffs' Brief in Support of Cross-Application, p. 16, emphasis by plaintiff) One would think, however, that if such things as intubation and placement of central arterial and venous lines were, in fact, "general pediatric maneuvers", Dr. Casamassima, as a full time practicing "general" pediatrician, would have done a few since his residency in the early 1980s. Of course,

"general" pediatric care was what Austin was receiving from his "general" pediatrician, Dr. Kennedy. When Austin presented at Dr. Kennedy's office on January 30, 1997 with severe respiratory distress, cyanosis and an oxygen saturation of 75%, Dr. Kennedy promptly placed him in an ambulance and sent him to the emergency room at the University of Michigan Hospital. (Exhibit A) This was because Austin required a level of highly specialized care that was far beyond the ability of Dr. Kennedy (or Dr. Casamassima) to provide.

This highly specialized level of care, known only to those who train and work in a pediatric critical care unit, is utterly foreign to Dr. Casamassima, by his own admission. During the year prior to Austin Woodard's treatment at Mott Children's Hospital, Dr. Casamassima worked as a general pediatrician, caring for a small patient population in the very limited setting of a home for mentally disabled children. He did not work in a hospital, and was never confronted with treating critically ill children requiring an airway, ventilatory support and rapid infusion of medications. He did not insert lines into tiny blood vessels, intubate infants or care for them when a virulent, potentially lethal virus threatened them. Nonetheless, Dr. Casamassima leveled numerous criticisms of the manner in which these activities were carried out in the critical care unit, both in his Affidavits of Merit and in his testimony. The trial court rightly determined that Dr. Casamassima was not qualified to do so.

The trial court based its ruling on MCL 600.2169, which provides in pertinent part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is a licensed health professional . . . and meets the following criteria:



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> (a) If the party against whom . . . the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom . . . the testimony is offered. However, if the party against whom . . . the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) . . . [D]uring the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> > (*i*) The active clinical practice of the same health profession in which the party against whom . . . the testimony is offered is licensed and if that party is a specialist, the active clinical practice of that specialty.
> >
> > (*ii*) The instruction of students . . . and, if that party is a specialist, [in] an accredited health professional school or accredited residency or clinical research program in the same specialty.

In *McDougall v Schanz, supra*, this Court determined that the statute is not merely a procedural nicety, but rather is substantive law. Its purpose was to prevent precisely what plaintiffs in the instant case sought to accomplish: allowing a manifestly unqualified "expert" to Monday morning quarterback the care of other physicians in whose specialties they have no experience or training. Id. at 461 at 36. (Requiring that expert witnesses actually practice the same specialty "will protect the integrity of our judicial system by requiring real experts instead of 'hired guns'", and ensure that proof of malpractice "emanate

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from sources of reliable character as defined by the legislature.") In upholding the constitutionality of the statute, this Court observed:

> [T]he statute 'reflects a careful legislative balancing of policy considerations about the importance of the medical profession to the people of Michigan, the economic viability of medical specialists, the social costs of 'defensive medicine,' the availability and affordability of medical care and health insurance, the allocation of risks, the costs of malpractice insurance, and manifold other factors, including, no doubt, political factors – all matters well beyond the competence of the judiciary to reevaluate as justiciable issues. [Citing Judge Taylor's dissent in the Court of Appeals decision in *McDougall*, 218 Mich. App 518.] 461 Mich. at 35.

Plaintiff claims that Judge Connors erroneously held that Dr. Casamassima was unqualified because he did not "exactly match" all of Dr. Custer's board certifications. A review of the transcript of the September 14, 2001 motion hearing transcript (specifically pages 30-31) will reveal that this is simply not accurate. Judge Connors made a number of observations about Dr. Casamassima's background and practice, all from his deposition testimony, which he prefaced with the statement: "The deposition of Dr. Kassimasseama (sic) reveals the following . . ." (T, 9/14/01, p. 30) Judge Connors referred to the fact that, ***between December 1993 and March 1998,*** none of Dr. Casamassima's practice involved pediatric intensive care medicine; the lack of experience or training, ***ever,*** as an attending physician in a pediatric intensive care unit; Dr. Casamassima's lack of experience in pediatric intensive care, pediatric hematology, or pediatric infectious disease; and the fact that he last intubated or inserted central lines in an infant during his residency in the early 1980s. (T, 9/14/01, p. 30-31) Judge Connors also gleaned from the deposition that, as of March 1998, Dr. Casamassima became a full time lawyer, and restricted his medical practice to two days a

week at the home for the mentally disabled. (T, 9/14/01, p. 31) ***At no point, however, did Judge Connors state that Dr. Casamassima was unqualified under MCL 600.2169 because he did not "exactly match" each of Dr. Custer's board certifications.*** Rather, Judge Connors was quite explicit as to the basis for his ruling:

> Considering this testimony, this Court finds that Dr. Kassimasseama (sic) did not devote a majority of his time within the year preceding the injury to the same active clinical specialty as Dr. Custer or the staff of the pediatric intensive care unit. Dr. Kassimasseama (sic) admitted that he had no experience with pediatric critical care within one year prior to the injury complained of.
>
> For these reasons, this Court finds that Dr. Kassimasseama (sic) is not qualified to testify as an expert witness, pursuant to MCL 600.2169. (T, 9/14/01, p. 31-32)

Plaintiffs invest much reliance upon language from the Court of Appeals' decision in *Tate v. Detroit Receiving Hospital,* 249 Mich. App 212, 642 NW2d 346 (2002). A careful review of the *Tate* decision, however, reveals that it supports Judge Connors ruling in the instant case, rather than providing, as plaintiffs imply, a basis for reversal. Plaintiffs place heavy emphasis upon language from *Tate* indicating that MCL 600.2169 "cannot be read or interpreted to require an exact match of every board certification held by a defendant physician . . . . [s]uch a 'perfect match' requirement would be an onerous task and in many cases make it virtually impossible to bring a medical malpractice case." *Tate,* 249 Mich. App at 219. Neither defendants nor Judge Connors took the position below that Dr. Casamassima needed to be certified in each of the specialties in which Dr. Custer is certified (pediatrics, pediatric critical care medicine and neonatology-perinatology) in order to qualify



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under section 2169. Rather, defendants and the trial court concluded that the specialty certification at issue in the instant case is pediatric critical care, a field of specialization in which Dr. Casamassima has no experience whatsoever.

Proper understanding of the ruling in *Tate* requires reference to the facts of that case. In *Tate,* plaintiff's decedent was admitted to the defendant hospital following a stroke. Id. at 213. Following placement of a urinary catheter, a hospital employee made a notation in the patient's chart regarding a possible urinary tract infection. Id. The decedent was transferred from the hospital without treatment for the infection; on the day of transfer, the decedent suffered a seizure and went into a coma. Id. His condition deteriorated and he died approximately one month later. Id.

Dr. David Lavine was the decedent's attending physician. Id. at 213-214. Dr. Lavine was board certified in internal medicine, critical care medicine, and nephrology. Id. at 214. In August 1997, plaintiff filed her Complaint, accompanied by an Affidavit of Merit signed by Dr. Jack Kaufman. The affidavit asserted that Dr. Kaufman was a board certified specialist in internal medicine. Id. Defendant moved to disqualify Dr. Kaufman on the basis that he was not qualified to render testimony against Dr. Lavine. The trial court granted the motion, holding that Dr. Kaufman was not board certified in the same specialties as Dr. Lavine, and therefore was not qualified to testify. Id.

The Court of Appeals reversed, rejecting the "perfect match" requirement in the language quoted above. Instead, the Court interpreted MCL 600.2169 as requiring that:

> [W]here a defendant physician has several board certifications and the alleged malpractice involves only one of these specialties, section 2169 requires an expert witness ***to possess the same specialty as that engaged in by the defendant physician during the course of the alleged malpractice.***
>
> Id. at 220 (emphasis added)

Having enunciated this rule, the *Tate* panel went on to apply it to the facts of that case. ***The panel specifically noted that plaintiff's decedent "was not in the critical care unit" at the time plaintiff alleged the urinary tract infection should have been treated.*** Id. at 220, n. 2. The panel was "mindful" that:

> [I]t [was] plaintiff's theory in this case that the malpractice occurred during the practice of internal medicine and not during the practice of nephrology or critical care. Allowing the defense to assert that either critical care or nephrology were involved in the alleged malpractice would effectively negate plaintiff's theory of the malpractice and thereby render plaintiff's expert unqualified under section 2169. We do not find that section 2169 exists to allow defendants in malpractice cases the opportunity to dictate a plaintiff's theory of the alleged malpractice.
>
> * * * * * * * * * *
>
> In this case plaintiff theorizes that the injuries sustained by Hall occurred after defendant hospital's employees failed to treat a urinary tract infection. At the time of this alleged malpractice, plaintiff proposes that [decedent] was receiving general care and not critical care or the care of a nephrologist. Therefore, only Lavine's specialty in internal medicine is involved. Both Dr. Kaufman and Dr. Lavine are board certified in internal medicine. The fact that Dr. Kaufman lacks board certification in nephrology and critical care is irrelevant because those specialties had nothing to do with the malpractice alleged by plaintiff. Therefore, Dr. Kaufman's and Dr. Lavine's qualifications were matched for purposes of the statute.
>
> Id. at 220-221.

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Reviewing this analysis, the distinction between *Tate* and the instant case becomes clear. In *Tate,* plaintiff "theorized" that the patient was not receiving critical care at the time of the alleged malpractice. In the instant case, however, plaintiff alleges that the fractures occurred during critical care procedures such as the intubation of the patient, and the placement of the central lines. In short, the decedent in *Tate* ***wasn't*** receiving critical care; by the instant plaintiffs' own admissions in the pleadings and Dr. Casamassima's affidavits and testimony, the fractures allegedly occurred during the course of critical care treatment in the Mott Hospital PICU. As such, the *Tate* decision supports Judge Connors ruling in the instant case.

It doubtlessly was in recognition of this fact that plaintiffs' Cross-Application asserts that "plaintiffs' theory is that the fractures of Austin's legs occurred during general pediatric maneuvers", in order to suggest that defendants sought to "dictate" plaintiffs' theory to render Dr. Casamassima unqualified. This court will review plaintiffs' Complaints, as well as Dr. Casamassima's affidavits and testimony, which abound with claims that the fractures occurred due to negligent performance of critical care procedures such as intubation and line placement, and take a jaundiced view of appellate counsel's attempt to re-write the record on appeal. Moreover, it is one thing to say, as this Court did in *Tate,* that defendants may not dictate a plaintiff's theory so as to render plaintiff's expert unqualified. It is quite another thing to suggest, as plaintiffs' do here, that the *Tate* decision may be turned on its head, and that plaintiffs may distort the record and advance "theories" on appeal completely contrary to those advanced in the trial court, in order to render their otherwise ersatz expert "qualified".

Finally, defendants acknowledge that this Court recently heard oral arguments in *Grossman v. Brown* (Docket # 122458) and *Halloran v. Bhan* (Docket # 121523). Undoubtedly the decisions in those cases will further clarify the proper construction of MCL 600.2912d. It is difficult to imagine, however, that this Court would construe the language of the statute in a manner which would permit so manifestly an unqualified expert as Dr. Casamassima to address issues of pediatric critical care medicine. Plaintiff has failed to convincingly argue that the trial court's decision regarding Dr. Casamassima was erroneous, and plaintiff's Cross Application should therefore be denied.



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## RELIEF REQUESTED

For the reasons stated in this Response, this court is requested to deny the Cross-Application for Leave.

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BY: 

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DATED: December 23, 2003

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**PROOF OF SERVICE**

STATE OF MICHIGAN )
ss.
COUNTY OF OAKLAND )

ELAINE MOORE, being first duly sworn, deposes and states that she is employed by the law firm of HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC, and that on December 23, 2003, she served a copy of Defendants/Cross-Appellees' Response to Cross-Appellants' Application for Leave to Appeal upon Craig L. Nemier, 37000 Grand River Avenue, Suite 300, Farmington Hills, MI 48335 by placing same in a United States Mail receptacle, properly addressed with postage fully prepaid thereon.

ELAINE MOORE

Subscribed and sworn to before
me on December 23, 2003.

**Judith A. Cowan**
Oakland County Notary Public
My Commission Expires: 01/30/05